

# **IN THE MATTER OF THE INQUIRY ON COPYRIGHT POLICY, CREATIVITY AND INNOVATION IN THE INTERNET ECONOMY**

## **COMMENTS OF THE FUTURE OF MUSIC COALITION**

**November 18, 2010**

Future of Music Coalition (FMC) is pleased to submit these comments to the United States Patent and Trademark Office and the National Telecommunications and Information Association in its Notice of Inquiry on Copyright Policy, Creativity and Innovation in the Internet Economy.

Future of Music Coalition is a national nonprofit organization that works to ensure a diverse musical culture where artists flourish, are compensated fairly for their work, and where fans can find the music they want. Founded in June 2000 by musicians, artist advocates, technologists and legal experts, FMC works to ensure that musicians have a voice in the issues that affect their livelihood. FMC's activities are rooted in the real-world experiences and ambitions of working musicians, whose perspectives are often overlooked in policy debates.

For a decade, FMC has observed and engaged directly with musicians to better understand how they are pursuing their craft in the digital age. FMC understands that revenue streams and marketplace conditions for artists and the music industry continue to evolve, with new challenges and opportunities presented by ongoing technological developments. There is little doubt that these developments have upended traditional business models in the music sector and beyond, but they have also created new opportunities for musicians to bypass the bottlenecks and gatekeepers that defined the original music industry and engage with fans directly.

As we have previously stated in public comments and at numerous stakeholder convenings, FMC is fundamentally concerned with:<sup>1</sup>

- Encouraging the development and widespread consumer adoption of legal, licensed services as a viable alternative to unlawful filesharing;
- Ensuring that all creators have access to a legitimate digital music marketplace;
- Highlighting how the independent sector would be affected by new efforts to enforce intellectual property.

### **Recognizing Creators as Stakeholders**

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<sup>1</sup> See Comments of the Future of Music Coalition, *Public Comments on the U.S. Intellectual Property Enforcement Joint Strategic Plan* (filed on March 24, 2010), available at [http://www.whitehouse.gov/omb/intellectualproperty/frn\\_comments/](http://www.whitehouse.gov/omb/intellectualproperty/frn_comments/).

The transition to a largely digital platform for music and other forms of creative commerce has not been a smooth one for some stakeholders, including major labels, whose dependence on traditional broadcasting and brick-and-mortar retail outlets undermined their ability to fully comprehend and respond to the sea change in the consumptive behaviors of music fans. Before Napster rewrote the rules for the entire industry, the major labels and publishers could count on widespread commercial radio airplay to generate strong CD sales in traditional retail outlets and big box stores. While this arrangement worked for some, it also foreclosed most musicians from having any real shot at reaching potential audiences. Independent and niche musicians faced tremendous barriers to entry to the marketplace, particularly following the widespread consolidation in radio station ownership facilitated by the 1996 Telecommunications Act.

For the last ten years, rightsholders have been coping with this seismic shift in a variety of ways. On one front, they have utilized American copyright law to battle unauthorized filesharing, shutting down infringing peer-to-peer networks and suing individuals for uploading. Meanwhile, emerging technology companies have established a variety of services for the lawful distribution and discovery of music. These new digital business models are a product of open internet structures, which has allowed unprecedented innovation in the promotion, distribution and access of music and other media. Currently, there are a plethora of platforms for lawful music discovery, including webcasters such as Pandora, download stores such as iTunes and eMusic, and on-demand streaming services such as Rhapsody, Napster and MOG, all of which compensate rightsholders. It is still early days for these new business models, and their viability will depend on consumer adoption and whether operational and licensing costs can be balanced against revenue generation. Still, the fact that these services have emerged over last ten years has been a promising development for creators, not to mention an indication of the value of the open internet and the business potential facilitated by widespread broadband adoption.

As these new digital services take shape, many musicians are embracing business models that allow greater independence and facilitate direct contact with their fans. Independent labels and artists can now take advantage of the vast reach of the web, and many are successfully using blogs, YouTube, Facebook, Twitter and fan development tools to route around traditional marketing, PR and sales mechanisms. The technological developments over the past ten years have made it possible for an increasing number of savvy and talented musicians to flourish outside of the major label system.

There is, of course, understandable skepticism that legitimate digital distribution structures can be monetized at a level that would replicate revenue streams generated by physical media. Although monetization schemes for traditional industry stakeholders are certainly worthy of discussion, it is equally important to consider the independent and niche music artists for whom access to the marketplace has historically been restricted by powerful gatekeepers. For these musicians, composers and songwriters, the internet and related technologies have been enormously beneficial in terms of exposure and the ability to sell a range of goods — including but not limited to music — directly to fans.

In considering public policies that relate to technology and copyright, FMC urges the USPTO and NTIA to regard musicians, songwriters and composers as stakeholders. While record labels and publishers desire certain outcomes, we believe it is equally important to ensure that musicians of all genres and backgrounds — *the actual creators* — can access the marketplace and advance their careers without undue interference from gatekeepers.

### **Leveraging Consumer Behavior and Broadband Adoption to Fight Piracy**

Clearly, the advent of peer-to-peer networks and other filesharing technologies has had a lasting, deleterious impact on many stakeholders in the music industry. Record labels and artists are now forced to “compete with free,” as peer-to-peer networks across the globe continue to facilitate the unauthorized exchange of files.

The initial industry response to the rapid growth of digital networks and P2P filesharing was to try to shut them down via copyright infringement lawsuits. In a number of cases, the labels and movie studios were successful in doing so, yet each shuttered network was quickly replaced, oftentimes with servers hosted in countries with little interest in enforcing US intellectual property laws. Additionally, record labels attempted to prevent consumers from uploading or sharing musical content by placing “locks” on music tracks through Digital Rights Management (DRM) technologies. However, most of these attempts were soundly rejected in the marketplace. Sony’s DRM on CDs was a high-profile boondoggle,<sup>2</sup> and even Apple — which initially benefited from industry-imposed proprietary DRM on its iTunes offerings — has since done away with digital locks.

Rightsholders have employed other tactics as well: suing alleged individual infringers, which has resulted in a number of out-of-court settlements and some high profile victories, but also mounting legal costs and a negative reaction among consumers; delayed product windows and geographic restrictions for streaming media; placing pressure on college campus IT administrators to deter infringement via the Higher Education Act; and protesting the development of technologies that would enable time or place shifting of music content.<sup>3</sup>

Although it is clear that peer-to-peer technology and other mechanisms for the unauthorized distribution of content have negatively impacted industry business models, it is difficult to know how effective any of these deterrent measures have been. First, there are concerns that data often presented by major rightsholders (and the US government) may be flawed. In April 2010, the GAO released its report “Intellectual Property: Observations on Efforts to Quantify the Economic Effects of Counterfeit and Pirated Goods,” which questioned the metrics and methodology often used to describe the extent of the filesharing problem. The GAO investigation found that reported

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<sup>2</sup> [http://en.wikipedia.org/wiki/Sony\\_BMG\\_CD\\_copy\\_protection\\_scandal](http://en.wikipedia.org/wiki/Sony_BMG_CD_copy_protection_scandal)

<sup>3</sup> Michael Hoffman, *XM Issues Statement about RIAA Lawsuit*, DAILYTECH, May 21, 2006, <http://www.dailytech.com/XM+Issues+Statement+About+RIAA+Lawsuit/article2446.htm>

damages to the American economy “cannot be substantiated due to the absence of underlying studies.”<sup>4</sup>

Second, consumers and creators alike are embracing licensed platforms for music access and discovery, including satellite radio, digital subscription services, internet radio, licensed video sites and digital download stores. Increasingly, the public is displaying a willingness to adopt legitimate services, which reinforces the critical notion that the combination of technical innovation, access to the underlying delivery mechanisms and reasonable licensing terms can create a revitalized industry that serves musicians, rightsholders and music fans.<sup>5</sup>

FMC continues to support the notion that the vibrancy of the creative sector depends on both “carrots” and “sticks.” Rightsholders should continue to work with emerging technology companies to develop licensed platforms and services that facilitate online discovery and access. Rightsholders should also choose their battles wisely in their effort to deter unauthorized filesharing.

Two things have become abundantly clear to us:

1. **The tech-enabled consumer is more in charge than ever.** The internet has eviscerated many of the traditional price and scaling mechanisms, such as specific release dates, territorial exclusives and differentiated price points. Today’s consumer also expects creative content to be eligible for time-and-device-shifting, available for their enjoyment when they want it, and on multiple devices. By more clearly understanding consumptive behavior, such as the increasing desire for on-demand content, the creative industries will be better able to implement models that fulfill consumer expectation while diminishing the attractiveness of piracy.

2. **Tomorrow’s content marketplace will be defined by consumer adoption of broadband technologies,** which come with their own regulatory and technological concerns. Spectrum and internet policy, as well as the viability of traditional broadcast mediums, will play a significant role in determining how consumers are able to access content, and how creators will be compensated, in the future.

This is by no means to imply that current conditions are ideal, or that there are tidy solutions to the host of increasingly interlinked marketplace and policy concerns that impact the creative sector. We acknowledge that the digital transition is complicated, but the goal of a more functional music ecosystem is one that stakeholders across the industry can and should share. Any strategies for the protection of intellectual property in the

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<sup>4</sup> Government Accountability Office (GAO), Report to Congressional Committees: *Intellectual Property: Observations on Efforts to Quantify the Economic Effects of Counterfeit and Pirated Goods* at 2 (April 2010) (item GAO 10-423) available at <http://www.gao.gov/new.items/d10423.pdf>.

<sup>5</sup> Claire Cain Miller, *Pandora: In the Middle of Music*, NEW YORK TIMES, March 8 2010. available at <http://bits.blogs.nytimes.com/2010/03/08/pandora-in-the-middle-of-the-music/?scp=2&sq=Pandora&st=Search>

digital realm should recognize — and embrace — widespread broadband adoption and favor solutions that give consumers a richer media experience; an experience that's better than free.

### **Legal Options Tied with Educational Efforts**

While it is well known that some perpetrators of infringement are profit-seeking enterprises of considerable sophistication, copyright protection strategies around individual users may require a different approach. Decisionmakers should consider the fact that respect for creators often comes from a more hands-on appreciation of why ideas and expression are worthy of safeguarding.

FMC suggests that stakeholders and the government pursue copyright literacy initiatives that promote respect for the creation of art and how education around technology and creativity might promote a legitimate digital marketplace. Whether through the U.S. Department of Education<sup>6</sup> or through a national Digital Literacy Campaign,<sup>7</sup> a strategic enforcement plan should also strive to educate future consumers and creators about the value of creativity and intellectual property to both our economy and cultural standing. A serious and sustained educational campaign to address the demand side of the infringement problem combined with an enforcement plan that preserves and encourages innovation in the legitimate digital marketplace might find support among a broader coalition of stakeholders.

### **The Benefits of an Open Internet**

The internet has allowed musicians and other creators to reach audiences on their own terms and participate in potentially rewarding new revenue streams, and its open platform for innovation has been the driving force behind all of the legal, licensed services now enjoyed by consumers. The continued development of the legitimate digital marketplace is in large part dependent on the continued openness of the internet. Musicians, in particular, depend on the web to engage in a variety of ways, including (but not limited to) direct interaction with audiences, booking tours, selling merchandise and collaboration with other artists across the globe.

FMC feels strongly that the continued innovation fostered by open internet structures will benefit and expand the legitimate digital marketplace, as more consumers discover robust, legal and licensed services that provide lawful access to a broad array of high-quality content on different devices. Although the entertainment industries are currently experimenting with pricing models, recent developments indicate that, where licensed

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<sup>6</sup> FEDERAL COMMUNICATIONS COMMISSION, NATIONAL BROADBAND PLAN p.232 released March 16, 2010 available at <http://download.broadband.gov/plan/national-broadband-plan.pdf>.

<sup>7</sup> NATIONAL BROADBAND PLAN at 174.

services are available,<sup>8</sup> consumers are beginning to forego peer-to-peer trading of both audio and visual content.<sup>9</sup> This is encouraging news for rightsholders; stakeholders and policymakers must be careful not to frustrate this still-maturing marketplace by fundamentally altering the open structures of the internet, which makes these and future innovations possible.

It is important that stakeholders and the government remain flexible in terms of pursuing legal or technological remedies to the problem of unauthorized filesharing. Any approach to IP enforcement must be balanced with a respect for lawful uses, as well as the preservation of a level technological playing field for all stakeholders, including independent creators.

## Global Challenges to IP Enforcement

The harmonization of intellectual property enforcement efforts is difficult to achieve given the range of conventions and conceptions from country to country regarding copyright. This same dynamic also presents challenges to achieving a functional marketplace for creative commerce that gives consumers cross-border access to desirable, legitimate content while respecting sovereign copyright laws. It is helpful to consider proposed approaches to both enforcement and commerce, as well as the impediments to implementation of potentially advantageous frameworks.

1. **Technological Remedies:** Much of the current talk around copyright protection revolves around new and unproven technological approaches to combat unauthorized filesharing. Some stakeholders favor network-level, ISP-managed detection mechanisms that would facilitate the interruption of non-approved transmissions. Putting aside questions about what kind of technology would be employed and its potential implications on privacy, there is the issue of the legitimacy of uses to consider. Would, for example, a recording artist under contract to a label that has tagged a specific piece of music as under copyright be committing infringement by transmitting via the internet a digital copy of said file to his or her grandparents? Without a clear set of exceptions and a flexible permissions system, even rightsholders may run afoul of copyright law in certain instances where clearances are unique and/or complex. Consensus around such a controversial approach to IP enforcement will be difficult at best to achieve at a global scale. It is also worth noting that in America, the safe harbor provisions for ISPs and online service providers in the Digital Millennium Copyright Act have played an important role in the development of today's internet. Yet certain ISP-

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<sup>8</sup> In France, for example, music fans currently stream more music than they download from online stores and P2P sites combined. This shift in consumer behavior is most likely a result of the availability of easy-to-use, legitimate streaming sites such as Spotify and Deezer. - Eliot Van Buskirk, *French Study: Music Streaming more popular than downloading* EVOLVER.FM, Nov. 10, 2010, <http://evolver.fm/2010/11/10/streaming-music-more-popular-than-downloading-music-france/>.

<sup>9</sup> Robin Wauters, *More Research to Back the Notion That Streaming Kills Piracy*, WASHINGTON POST, December 2, 2009: available at <http://www.washingtonpost.com/wp-dyn/content/article/2009/12/02/AR2009120200748.html>

deployed technologies to determine file legitimacy may place the provider outside of their safe harbor under the DMCA.

2. **Legal Remedies:** Expanded legal authority to combat infringement is also being advocated by some stakeholders. Although FMC doesn't oppose the fashioning of new statutes or mandates to protect IP, we urge judiciousness in their breadth and application. Legislation such as the recently-introduced and well-intentioned Combating Online Infringement and Counterfeits Act (COICA) could, due to the broadness of its provisions, have an adverse impact on some of the creators it is meant to protect.<sup>10</sup> Whether it is the so-called "graduated response" or "three-strikes" regimes being enacted in Europe or proposed US legislation to expand law enforcement jurisdiction over infringing foreign websites, it is crucial that such measures are not detrimental to lawful, legitimate content, sites and services and that proper avenues of recourse exist for "false positives," i.e., those who have been inadvertently and incorrectly accused of infringement. It is also important to consider who bears the burden of proof in such instances, and whether resolution favors the party with the most resources to defend its position. The picture will likely become clearer when data from the European experiments with ISP disconnections for repeat infringers becomes available.

## **Identification, Licensing and Marketplace Compensation**

Even with the shift to largely digital platforms for music sales, there remain persistent problems in the identifying copyright owners of digital files. This impacts artist compensation across platforms — from online music services to broadcast and digital performance royalties. It seems prudent to work towards a resolution of this issue for the benefit of paying creators before pursuing an aggressive ISP detection regime or overbroad and possibly ineffective statute.

One clear obstacle to moving forward on this matter is the reluctance of some stakeholders to accept a transparent, non-proprietary method for identifying copyrighted works. Yet without such a standard, it seems likely that a great many creators and rightsholders will continue to fall through the cracks and not receive compensation owed to them.

A properly functioning identification system would likely require standards to be internationally recognized, due to the non-geographical nature of the internet. This naturally implies the creation of a global repertoire database (GRD), yet the implementation of such a database raises questions about America's international IP treaty obligations, as well as who or what body would be responsible for building and maintaining such a registry and handling arbitration. Regardless of complexities and governance, there is a strong rationale for establishing such a registry, and discussions are

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<sup>10</sup> Sherwin Siy, *New Copyright Bill Bears Problems: Concerns with S.3804, the Combating Online Infringement and Counterfeits Act (COICA)*, PUBLIC KNOWLEDGE, Sep. 25, 2010, <http://www.publicknowledge.org/blog/new-copyright-bill-bears-problems-concerns-s3>

currently underway about how to best approach the issue. It remains to be seen whether the idea of a repertoire database, domestic or international, will be embraced by a critical mass of stakeholders. If and when such a system is implemented, however, it must be open to all artists who seek to identify their works within the database, and not just the major rightsholders.

It is conceivable that a more functional system for the identification of copyrighted files would also make licensing less cumbersome. Enhanced efficiencies could lead to more opportunities for compensation as technology continues to produce novel mechanisms for the distribution and access of creative commerce. There are some who advocate for a blanket license for sound copyrights online, and such a regime would undoubtedly benefit from some form of registry. However, resolving current problems with file identification is important regardless of the utility or viability of a blanket license.

## **Conclusion**

FMC is supportive of ongoing efforts to protect copyright in the digital realm. Yet we also recognize that creative commerce online is not solely an entitlement of major rightsholders — it's important to all creators, independent and otherwise. The structures around copyright must be designed to provide maximum benefit to all artists, as well as those consumers who support these vital economies. Likewise, any IP enforcement regimes must be inclusive, transparent and not destructive to the legitimate digital marketplace, which includes noncommercial content, as well as nuanced affirmations of copyright (such as Creative Commons licenses) that have arisen largely as a response to evolving notions of usage.

In examining the intersection of networked technologies, copyright and commerce, we urge decisionmakers to consider a broad set of stakeholders that includes musicians, particularly those independent artists for whom access to online technologies is increasingly crucial. While we believe that protecting IP is of utmost importance in order for artists to exploit their copyrights across platforms, we also recognize that the legitimate digital music marketplace needs time to mature. It is our view that innovation, education and adoption of new technologies may hold important keys to the stabilization of the marketplace and a healthier music ecosystem.

In addressing international IP issues, we suggest that the stakeholders and the government not seek one-size-fits-all remedies that may stymie market expansion and freeze the development of US copyright law. Finally, by approaching intellectual property with an eye towards education, we believe that a broader understanding of and respect for copyright among the American public is possible.

We thank you for the opportunity to submit these comments.

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